No. 89-380

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CARL P. CALDWELL,
Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. FAILURE TO PERMIT AN AMENDED COMPLAINT

Bell inaccurately states in its Response that Caldwell never raised below the issue that Bell's board of directors failed to approve the bona fide executive exception by amendment to Bell's pension plan.[1] Plaintiff filed its first leave to amend his Complaint on January 26, 1982. [Ap.158].[2] In the brief attached thereto, Caldwell stated:

> "It is plaintiff's position that the Committee, in this instance, specifically decided that the amendment necessitated the approval of the Board of Directors and therefore recommended such action. When such approval was not obtained, the amendment thereby became ineffective and furnished no basis for a reliance by defendant on the bona fide executive or high policy making position exception to the normal age 70 protection of the ADEA." [S.Ap.1,7].

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1 pp.4&13 of Respondent's Brief in Opposition to Petition for Writ of Cert. ("Bell's Resp.").

2 Reference to Caldwell's original appendix is, as in Caldwell's Petition for Writ of Certiorari, "Ap.__". Reference to the supplemental appendix attached to this reply is: "S.Ap.__", furnished solely for rebutting the above mentioned misrepresentation.

On February 12, 1982, Bell even argued in the District Court that such a review by Bell's Board of Directors was not necessitated [S.Ap.9&10], and in another document filed the same day, Bell stated:

> "Plaintiff's brief incorrectly states that the Committee 'felt that the amendment concerning the bona fide executive or high policy making required the approval of the Board of Directors'". [S.Ap.13].

On February 24, 1982, Caldwell filed a reply directed to this very issue. [S.Ap. 15-23].

Caldwell requested leave to amend again on May 3, 1984 [Ap.163], and urged that Bell had failed to adopt a valid amendment to its pension plan that purportedly enacted the bona fide executive exception. [S.Ap.24-26]. In that document with the accompanying proposed order and proposed amended Complaint, Caldwell again urged that Bell had failed to obtain Board approval. S.Ap.26-29].

On May 30, 1984, Bell again responded and succinctly stated:

> "Plaintiff's requested first amendment * * * alleges that the defendant's decision making process was defective in that * * * the Committee's action at a meeting held on December 20, 1978, adopting the ADEA amendment to the Plan required approval of the Board of Directors." S.Ap.30-32].

At the Circuit Court level, Caldwell specifically urged, on pages 10 and 11 of its reply brief, that the District Court committed reversible error for not permitting Caldwell to amend his Complaint so as to allege and prove that Bell invalidly adopted a bona fide executive exception as an amendment to its pension plan.

> "Caldwell's request to amend his complaint is addressed to the most fundamental element that SWBT[3] is required to meet, i.e., 'were the terms of the SWBT plan properly amended so that the exceptions could be used under the provisions of 29 U.S.C. §623(f)(2) of the ADEA'? Simply put, the issue is whether

---

3 Bell was frequently referenced as "SWBT" in both lower courts.

> SWBT's Board of Directors was required to approve the aforementioned changes in the plan." [S.Ap.33-35].

The issue rose again in Caldwell's Petition for Rehearing before the Tenth Circuit. [S.Ap.36-39].

The attached supplemental appendix was not included in the original appendix because it was incomprehensible to Caldwell that Bell would claim such an issue had not been argued numerous times in both the Trial and Appellate Courts. Caldwell is shocked at such a misrepresentation by Bell. Caldwell is not claiming Bell purposely misstated the record to this Honorable Court; however, Bell's ineptness in properly reviewing the records below casts doubt on other unsupported assertions contained in Bell's Response.

Bell urges on page 13 of its Response that Board approval for the amendments to the pension plan were unnecessary, as

they were "required by changes in the law". Caldwell disagrees with such an assertion. Since the sole statutorily required change made in the Plan was the removal of the provision of mandatory retirement for all employees at age 65, Bell's assertion that the Plan amendments "were substantively required by changes in the law" is inaccurate.

In short, Bell chooses to ignore that it is the "opinion of the committee", as set forth in the Plan, which governs when changes in the Plan are required or made desirable by federal or state statutes, and as a result thereof when the Board of Directors' approval for the changes is not required. Changes made in the Plan for the mandatory retirement of bona fide executives at age 65, and for all other employees at age 70, and for the freezing of pension benefits for employees who worked after age 65, were changes that were permitted but not required by law.

Bell's attempt to change permissive provisions to "those required by changes in the law", is another misstatement of facts in the case at bar.

II. **JURY TRIAL - BONA FIDE EXECUTIVE**

At the top of page 12 of Bell's response, Bell claims Caldwell's evidentiary standard argument is "confusing", but fails to elucidate. The argument is simple and concise. Under 29 C.F.R. §1625.12(b), Bell's burden of proof must meet the clear and convincing evidence standard. That standard must be considered by the trial court in ruling on a motion for summary judgment. Anderson vs. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-2514, 91 L.Ed.2d 202 (1986). Bell failed to meet such a standard. Furthermore, even as to undisputed facts, the trial court is prohibited from drawing ultimate inferences therefrom where, as here, such inferences are divergent.

Anderson vs. Liberty Lobby, Inc., id. The District Court improperly drew an inference that Caldwell was a bona fide executive from the facts submitted by Bell. Such was an usurpation of a jury's proper function.

Irrespective of Bell's bold assertion that "Congress and the published regulations intended an objective, market place or external view of" Caldwell's responsibilities when determining whether Caldwell was, or was not, a bona fide executive, it is an inescapable conclusion that one of the many relevant considerations is Bell's own historical perception of Caldwell's actual status.

The 1978 revision of the ADEA, inter alia, created a new classification of exempt employees, so-called bona fide executives, that permitted employers to utilize the exemption, if they so chose, so as to retire only a limited number of employees at age 65 rather than at age

70. 29 U.S.C. §628 initially authorized the DOL to issue such rules and regulations, as necessary, to carry out the provisions of the ADEA. Subsequently, that function was transferred to the EEOC. Such an authorization was implemented in 29 C.F.R. §1625.12(d) on November 12, 1979. Though, as noted in the regulation, the definitions and examples therein are based solely on the Conference Committee report, the employees subject to the exception described in the Committee report as "only certain high level executives" became, in the regulation, "a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business."

Since the bona fide executive exception applies to all covered employers, some with as few as 20 employees to employers as large as Bell

with almost 100,000 employees, the terms "significant number of employees", and "large volume of business" must be interpreted and evaluated relative to the size of the employer and not in a vacuum or in absolute terms. Furthermore, the extent to which an employee exercises "substantial executive authority" is dependant upon an evaluation of the extent to which internal policies and practices place limits on that authority and to the extent higher level employees may overrule that authority. A so-called "objective, marketplace or external" valuation does not, and obviously did not take these factors into consideration.

At a jury trial, a jury would be permitted to interpret and evaluate the evidence comparing such things as: (1) the number of employees subordinate to Caldwell (alleged to be 441) with the fact that there was a total of almost 100,000 employees of Bell, and (2)

Caldwell's budget (alleged to be $7,500,000) with Bell's total budget (an alleged $3,338,400,000 for 1979). It is those types of considerations and relationships that a jury should have considered. Furthermore, a jury would consider Bell's control and amount of authority over Caldwell and the restrictions of Caldwell's authority.

In summation, not only was it improper to deny a jury an evaluation of Bell's historical perception of Caldwell as a bona fide executive, but it was likewise error to deny the jury the right to evaluate Bell's subsequent and belated labelling of Caldwell as an executive and as such, to consider such issues as motive, intent, Bell management's state of mind and credibility. Anderson v. Liberty Lobby, Inc., Id.

III. FORFEITABLE PENSION BENEFITS

Though Bell argues, on the one hand, that its pension benefits were

nonforfeitable, it irreconcilably admits, near the end of page 7 of its Response, that its Plan contained a "slightly more expansive definition" of "permitted suspensions" than those statutorily allowed. However, faced with the inescapable conclusion that its pension plan forfeiture of benefits provision was illegal, Bell attempts to make light of it by proclaiming "Caldwell has not contended" that such an illegal provision "operates to discriminate against" him. To the contrary, that is EXACTLY what Caldwell does contend and has contended from day one in this lawsuit. Caldwell most certainly "claims" a "substantive violation of ADEA by operation of the pension benefits suspensions."

Although the Bell provisions for the suspension of benefits had been in effect since 1913, well before the enactment of the ADEA in 1967, the provision in Bell's Plan became illegal after the enactment

of ERISA in 1974, and the continuance of such an illegal provision in a plan certainly becomes a subterfuge if it discriminates in a manner forbidden by the substantive provisions of the ADEA. The suspension of benefit provision resulted in far reaching limitations for Bell retirees in seeking post-retirement employment, and this is certainly contrary to the substantive requirement of 29 U.S.C. §623(a)(2) that "it shall be unlawful for an employer * * * (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

The bona fide executive exception to the ADEA required that the Bell plan benefits be nonforfeitable and when Bell attempted to amend its plan in 1978 to

adopt the bona fide executive exception, the Bell plan had not yet been amended to bring it into compliance with the ERISA standards. This "post-Act" amendment in Bell's pension plan deprived retirees of further employment to which they were entitled, and this was therefore a substantive violation of the ADEA and a subterfuge to evade the purposes of the ADEA. Public Employees Retirement System of Ohio vs. Betts, 109 S.Ct. 2854, 2862 and 2865-2866 (1989).

Bell is again inaccurate at the top of page 9 of its Response wherein it states that Congress directed the DOL to define "employer". Code and ERISA state the DOL shall issue "such regulations as may be necessary to carry out the provisions of this subparagraph, including regulations with respect to the meaning of the term 'employed'". 26 U.S.C. §411(a)(3)(B) & 29 U.S.C. §1053(a)(3)(B). No where did Congress direct any agency to deviate

from the statutory definitions of "employer" set forth in both the ADEA [29 U.S.C. §630(b)] and ERISA [29 U.S.C. §1002(5)], or the definition of "employee" set forth in the ADEA [29 U.S.C. §630(f)] and in ERISA [29 U.S.C. §1002(6)]. Any argument to the contrary, as advanced by Bell and the Circuit Court, is certainly "novel". Certainly Congress did not give "exceptionally broad powers" to the DOL to interpret the meaning of the word "employer". This authorization has been taken out of context by Bell and expanded to conclude that reliance cannot be placed on the definition of "nonforfeitable" in 29 U.S.C. §1002(19), or the definition of "the employer who maintains the Plan" in 26 U.S.C. §§411(a)(3)(B) and 414(b), or the definition of a "controlled group of corporations" in 26 U.S.C. §1563.

Other examples of the Circuit Court's "novel" theories, and not heretofore

noted in either this reply brief or the initial Petition, concerns such theories (or rationalizations) supporting Bell's illegal plan as: (1) it would have been simple for Bell to amend its plan if the necessity to do so was clear [CA.Op.p.24; Ap.44]; (2) Caldwell failed to establish that Bell stood to gain any advantage from relying on an interchange of benefits approach, rather than a controlled group approach [CA.Op.p.25;Ap. 45], or that other employers were similarly situated [CA.Op.p.23;Ap.42], and that regulatory agencies had undertaken enforcement concerning same [CA.Op.p.24;Ap.43]; and (3) Bell's self-serving affidavit that "no AT&T employee had ever had retirement benefits suspended because of reemployment with one of the three minority owned companies in the AT&T System". [CA.Op.p.24-25; Ap.44-45].

In approaching these "novel" theories

in reverse order, the immediately aforesaid affidavit itself evidences the fact that retirees are limited in their employment opportunties because they do not seek employment with any "interchange company" where their benefits would be forfeited by virtue of doing so. Furthermore, Caldwell is unaware of any law that requires him to establish that either Bell "stood to gain an advantage", or that enforcement action had been initiated against other employers similarly situated, in order to prevail on his age discrimination case against Bell. In fact, Caldwell can think of no more irrelevant evidence than whether a federal agency did or did not seek enforcement action against Bell or any other "similarly situated" employer. Neither side presented such evidence below; nor did they attempt to do so.

Likewise, Caldwell is unaware of a rule of law that would require an emplo-

yer, such as Bell, to comply with statutory ERISA, Code and ADEA requirements only if that employer feels it is necessary to do so. Certainly, it is illegal for an employer to unilaterally determine that its "interchange" agreement system is "better" than the Congressionally mandated "controlled group" of companies system, and then blatently refuse to comply with the statutory directives. Furthermore, the statement in the Appellate Court Opinion that Bell could have readily complied in 1979 with the statutory directives, certainly is not an excuse or justification for permitting Bell not to comply, and, at most, is a disingenuous argument supporting an absolution of Bell. These "theories", thrown into the Appellate Court Opinion as deceptive pillars supporting its decision and unaccompanied by any supporting authority, are indeed "novel".

Lastly, it is noted that Bell failed

to respond to the argument urged on page 32 of Caldwell's Petition for Writ of Certiorari. Therein Caldwell noted that if indeed Bell and the Court of Appeals are correct in their conclusion that the law was "unclear" and "in a state of flux", then Bell was unable to comply with the mandate of 29 C.F.R. §2530.210 stating that every element of the bona fide executive exception must be shown by Bell to have been clearly and unmistakably met. Apparently Bell has abandoned any objection to such an analysis.

CONCLUSION

Caldwell respectfully submits that he has established in his Petition, the prerequisites for acceptance of his Petition under Rule 17.1 of the Supreme Court Rules, i.e., the Tenth Circuit decided certain questions in a way in conflict with applicable decisions of this Court. Respondent replies there are

no "novel or important principles of law and no elements of great public interest" [Bell's Resp. p. 2] or of "public importance" [Bell's Resp. p. 14]. The principles of law are adequately described in the Petition and stand on their own. The importance of these are almost self-evident.

Despite Respondent's statement to the contrary, the following recurring issues are before this Court:

(1) Do statutory requirements not have to be met because an agency could issue regulations overriding those requirements, as so held by the 10th Circuit?

(2) Is a statutory permissive exception to the ADEA available, if arguably, the permissive exception is unclear, as so held by the 10th Circuit?

(3) Does the statutory definition of nonforfeitable pension benefits require the actual forfeiture of benefits by a retiree to prove that the benefits are

not nonforfeitable, as so held by the 10th Circuit?

(4) Is the definition of a bona fide executive under the ADEA a matter subject to statutory interpretation rather than a determination by a jury, as so held by the 10th Circuit?

(5) Can leave to file an amended Complaint be denied when facts supporting same are not revealed prior to discovery, as so held by the 10th Circuit?

Respectfully submitted,

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CERTIFICATE OF SERVICE

Joseph A. Claro, a member of the Bar of this Court hereby certifies that on the 24th day of October, 1989, three copies of the above and foregoing instrument with attached appendix were deposited in a United States mail box, with first-class postage prepaid, and addressed to counsel of record for respondent, at said counsel's post office address as follows:

Mona S. Lambird, Esq.
Andrews, Davis, Legg,
Bixler, Milstein and Murrah
500 West Main
Oklahoma City, OK 73102

Respondent is the only party required to be served herewith.

_____
Joseph A. Claro

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT

OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. CIV-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	[Attached to Caldwell's Request to file Amendment to his Complaint. Ap. p. 158-161]

BRIEF

This brief is submitted in support of the accompanying motion for permission to file an additional amendment to the Complaint.

The 1978 amendment to the ADEA, after raising the protected age group from 65 to 70, provides for an optional exception to employers in the following language:

> "Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who *** is employed in a bona fide executive or a high policy making position, if ***".

By its own language, the use of the exception is optional to the employer. The Act certainly does not direct the employer to retire all executives or policy making personnel who have reached age 65. This construction is confirmed by EEOC's final interpretations for the Age Discrimination in Employment Act Exemptions for Bona Fide Executives or High Policy Making Employees. The interpretations are codified as 29 CRF 1625 and were issued at 44 F.R. 66971, effective November 21, 1979. Section 1625.12(c) contains this language:

> "An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status."

The option chosen by defendant was to forcefully retire plaintiff at age 65. On January 12, 1982, the defendant, pursuant to plaintiff's request, produced

a copy of its "Plan for Employees' Pensions, Disability Benefits and Death Benefits" in effect on the date of plaintiff's retirement. With reference to amendments to the Plan, it provided:

> "SECTION 10. CHANGES IN PLAN.
>
> The Committee, with the consent of the President, and subject to the approval of the Board of Directors (or without such approval in the case of changes which, in the opinion of the Committee, are dictated by requirements of federal or state statutes applicable to the Company or authorized or made desirable by such statutes) may from time to time make changes in the Plan set forth in these Regulations, and the Company may terminate said Plan, but such changes or terminations shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder." (Emphasis supplied.)

Also produced by the defendant in response to a previous request by plaintiff, were the Minutes of "A Special Meeting of the General Employees' Benefit Committee" held on Wednesday, December 20, 1978 in St. Louis, Missouri. A copy

of the document is attached. It is significant that in the Resolution passed by the Committee, and despite the contents of the letter sent by the Chairman to the President (a copy of which is also attached), the Committee itself requested that the President "submit the changes to the Board of Directors for consideration". At that time, Southwestern Bell Telephone Company was the sole proprietor of its benefit plan (see Admission No. 2 filed November 2, 1981) and its own Committee which administered the Plan obviously felt that the amendment concerning the bona fide executive or high policy making position required the approval of the Board of Directors. Despite such recommendation, no such approval was obtained. Instead, the President's approval was simply endorsed at the bottom of the letter written by the Chairman forwarding the resolution. Likewise in effect on the date of

plaintiff's forced retirement was the Employee Retirement Income Security Act of 1974, 29 U.S.C., §§ 1001 to 1381. 29 U.S.C., § 1102, after providing that each employee benefit plan shall be established and maintained pursuant to a written instrument and that the Plan will be managed by named fiduciaries, provides in part:

> "(b) Every Employee Benefit Plan shall--
>
> (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the Plan."

Section 1104, (subject to certain immaterial exceptions) relating to "fiduciary duties" then provides, in part:

> "Sec. 1104(a)(1) * * * a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> * * *

(D) in accordance with the documents and instruments governing the plan * * *."

Section 1109(a) provides, in part:

"Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter * * * shall be subject to such other equitable or remedial relief as the court may deem appropriate * * *."

In this instance the defendant itself is a named "fiduciary" in the Plan under Section 3.6 thereof and is represented by its President, who, when he approved the adoption of the Resolution, presumably knew that the Committee itself had recommended its submission to the Board of Directors. Plaintiff recognizes that this case does not involve any personal liability of a fiduciary as contemplated by Section 1109(a) above quoted. It is quoted only to point out that the applicable law not only specifies the duties of the fiduciaries but also imposes sanctions for not following the provisions of

the Plan. It follows that such a failure should logically result in the Court declaring the unauthorized act to be a nullity.

It is plaintifff's position that the Committee, in this instance, specifically decided that the amendment necessitated the approval of the Board of Directors and therefore recommended such action. When such approval was not obtained, the amendment thereby became ineffective and furnished no basis for a reliance by defendant on the bona fide executive or high policy making position exception to the normal age 70 protection of the ADEA. In paragraph 16 (Second Affirmative Defense) of its Answer, the defendant has stated: "The plaintiff's job position with the defendant for two years prior to November 30, 1979 was a bona fide executive or a high policy making position of the type described in Section 12(c)(1) of the Age Discrimination in Employment Act

and further, plaintiff was entitled to an immediate non-forfeitable annual retirement benefit in excess of $27,000.00 from a pension plan of the defendant. Defendant acted lawfully and consistently within the intent of Congress in retiring the plaintiff at age 65". If defendant had not effectively adopted its option to retire plaintiff based on said exception to the ADEA then it had no such option and was bound by the other provisions of the Act banning forced retirement prior to age 70.

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT

OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. CIV-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	[Filed Feb. 12, 1982 Herbert T. Hope Clerk, U.S. Dist. Court]

DEFENDANT'S RESPONSE TO REQUEST BY PLAINTIFF TO FILE ADDITIONAL AMENDMENT TO COMPLAINT

Comes now defendant, Southwestern Bell Telephone Company, and responds as follows to plaintiff's request to amend his Complaint:

1. Plaintiff's requested amendments are contrary to the facts filed with this Court, will serve only to obfuscate the important issue(s) in this cause and will

not serve justice as required by Rule 15(a) of the Federal Rules of Procedure.

2. Plaintiff requests leave to amend by adding a paragraph 12(a) to his Complaint alleging that defendant improperly amended its Plan to permit retirement of bona fide executives. This allegation is wholly contrary to the facts discovered in this proceeding, in that (1) defendant's Plan authorized defendant's Benefit Committee, with the consent of the President -- and without Board of Director approval --, to approve changes authorized or made desirable by law;

* * *

The facts produced in this cause are that (1) the recommendation of defendant to the Committee expressly states that no Board approval is required; (2) AT&T

expressly recommends no Board approval; (3) the Committee's RESOLUTION, the only official action of the Committee, does not require -- or even suggest -- Board action; (4) the letter approved by the Committee and attached to its minutes expressly states no Board approval is required; (5) the letter actually sent to the President states no Board approval is required; (6) the President approved the ADEA changes without submitting the amendment to the Board;

* * *

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT

OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. CIV-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	[Filed Feb. 12, 1982 Herbert T. Hope Clerk, U.S. Dist. Court]

MEMORANDUM SUPPORTING DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST TO AMEND

PROPOSITION I: DEFENDANT'S AMENDMENT OF ITS "PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS" (PLAN) TO ENCOMPASS THE BONA FIDE EXECUTIVE PROVISION OF SECTION 12(C)(1) OF ADEA WERE FULLY IN ACCORD WITH DEFENDANT'S PLAN:

* * *

Plaintiff's brief incorrectly states that the Committee "felt that the amendment concerning the bona fide executive or high policy making required the approval of the Board of Directors"

(plaintiff brief, p. 2). Plaintiff misstates the facts of record in this cause.

No documents of defendant's Committee even mention the need for Board approval. In fact, the Plan, all documents supplied to the Committee, the Committee RESOLUTION and the letter attached to the Committee minutes expressly require no Board approval.

* * *

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT

OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. CIV-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	[Filed Feb. 24, 1982 Herbert T. Hope Clerk, U.S. Dist. Court]

PLAINTIFF'S RESPONSE TO DEFENDANT'S RESPONSE TO REQUESTS BY PLAINTIFF TO FILE ADDITIONAL AMENDMENT TO COMPLAINT IN MEMORANDUM IN SUPPORT THEREOF

The above two documents, though filed on February 12, 1982, were, by reason of a weekend, a holiday, and mail delay, not received by the undersigned until just before noon on February 17, 1982. On that afternoon I had no opportunity to even read them, and because I was out of town until February 22, 1982, had no opportunity to examine them until that date. As yet plaintiff has neither been instructed nor invited to respond to such

instrument and under ordinary circumstances would not do so. An exception in this instance is made because of the numerous assertions that statements made in plaintiff's request to file the amendment and in the accompanying brief were "in error" as not being in accord with the discovered facts. This response is prepared to demonstrate that such statements themselves are the ones "in error". The two documents recently filed by the defendant will be referred to as defendant's "Response" and defendant's "Memorandum", both filed on February 12, 1982.

THE DOCUMENTS FURNISHED BY DEFENDANT TO PLAINTIFF TO SUPPORT PLAINTIFF'S REQUEST TO AMEND THE COMPLAINT

1. Basically, the defendant's position in both its "Response" and "Memorandum" is that the last paragraph of the Minutes of the Employees' Benefits Committee (attached as Exhibit "1" to defendant's "Memorandum" and likewise to

plaintiff's Brief to support his Motion to Amend) is neither a portion of the Resolution passed by the Committee nor does it reflect the action actually taken by the committee in that meeting. Since that paragraph affirmatively reveals that the chairman recommended and the committee "voted" that "the president submit the changes to the Board of Directors for consideration" it is difficult for us to understand why plaintiff was "in error" in stating that such action was taken by the committee.

2. In Paragraph 3 of its "Response" defendant, assuming *arguendo* that the applicable provisions of ERISA as quoted in plaintiff's Brief is applicable, asserts first that defendant acted fully "in accordance with the documents and instruments governing the plan". Then, it adds:

> "In any event, the determination that the job plaintiff performed was sufficiently responsible to

come within the bona fide executive exemption to the AREA [sic] was made *by the officers of the defendant. The Benefit Committee merely fixed the amount of pension due plaintiff."* (Emphasis supplied.)

The quoted language comes as a surprise to us, in view of the language contained in the defendant's "Schedule of Authorizations - Application and Use" dated September 1, 1979 (furnished pursuant to plaintiff's Second Request, No. 7):

"Par. 1.01, Scope of Schedule - Subject to such policies and limitations as the Board of Directors may from time to time establish, the President shall have general charge and direction of the Southwestern Bell Telephone Company with authority to carry on its ordinary business. * * * Pursuant to this authority, the President delegates to the officers and other employees authority to act for the company as set forth in this Schedule * * *.

* * *

Par. 1.04 This schedule shall in no way affect delegation of authority made by the Board of Directors for the administration of the 'Plan for Employees' Pension, Disability Benefits and Death Ben-

efits. For matters relating to the administration of that Plan, reference should be made to the Plan itself and the authorities concerning it established from time to time by the Board of Directors."

There is no provision in the Schedule of Authorizations for the retirement of any employee. This authority rests exclusively with the Benefit Committee, appointed pursuant to the Benefit Plan, to administer the Plan as approved by the Board of Directors. In this instance, Southwestern Bell had its own Plan and was not included in the Plan of AT&T or any other of its subsidiaries. (Admission No. 2 to plaintiff's Request for Admission.) Additionally, it is noted that plaintiff's retirement letter came from the Benefit Committee and that he was retired under the Employees' Benefit Plan. (Letter from defendant to plaintiff dated October 11, 1979.)

3. With respect to whether or not the "opinion of the Committee" recommended

the submission of the amendments to the Board of Directors (rather than just to the President), defendant states, on Page 2 of its "Memorandum" that "the minutes of December 20, 1978 committee meeting included a copy of a letter authorized to be sent to the President of defendant by the chairman of the committee" and refers to defendant's response to plaintiff's original Request No. 3 for production of documents. It is noted that in such response there was no copy of a letter attached to the minutes of the committee's meeting of December 20, 1978. Now, however, defendant asserts that "The minutes * * * included a copy of a letter authorized to be sent to the President of defendant by the chairman of the committee." (Defendant's "Memorandum", (p.2) and infers that the suggested "form" letter received from AT&T and attached as Exhibit "2" to the "Memorandum" was the letter attached to

the minutes. There is simply no way this could be true because the said Exhibit "2" does not conform with the action taken by the committee. If any letter had been attached to those minutes it would necessarily, in conformance with the minutes, have advised that the committee, on recommendation of the chairman, had "voted" to request that the "President submit the changes to the Board of Directors for consideration." It would seem apparent that what happened is this: the committee desired that the proposed amendments (as forwarded by AT&T) be submitted for consideration by the defendant's Board of Directors. Accordingly, it did not attach the suggested letter (forwarded by AT&T) to its minutes. (If *any* letter was attached it would have included the committee's recommendation concerning submission to the Board of Directors.) The chairman alone included in his letter to the Pres-

ident of defendant a statement that such amendments required only the approval of the President. Such statements constituted neither the "opinion" nor the act of the committee. Acting thereon, defendant's President simply approved the letter written by the chairman and gave no consideration to the committee's recommendation, there being no indication in the chairman's letter that a copy of the committee's minutes were even enclosed.

On page 3 of its "Response" defendant lists seven (7) specific "facts produced in this cause" in support of its assertion that there is no basis for permitting the requested amendment. Plaintiff has no quarrel with numbers (2), (5), (6) and (7). With respect to (1) and its statement referring to "the recommendation of defendant to the committee" it is noted that if such a recommendation ever existed it has not been produced for

plaintiff's inspection. In regard to (3) we can- not agree that the Resolution (if it can be logically separated from the last paragraph of the minutes) constituted "the only official action of the committee". It is unrealistic to even suggest that the vote of the committee referred to in the last paragraph of the minutes did not constitute an "official act of the committee". With respect to (4), and as demonstrated above, it is apparent that <u>if</u> a letter was attached to those minutes, it most certainly would have been in conformity with the committee's recommendation.

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT

OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. CIV-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	[Filed May 3, 1984 Herbert T. Hope Clerk, U.S. Dist. Court]

PLAINTIFF'S MOTION TO FILE ADDITIONAL AMENDMENTS TO COMPLAINT

FIRST AMENDMENT

COMES NOW the plaintiff and moves this Court for leave to amend his Complaint by adding the two additional paragraphs originally requested to be added by plaintiff on January 26, 1982 (as amended by the pleading attached to his letter of February 9, 1982 to the Court incorpor-

ated herein by reference). (Appendix "A" attached hereto.) In support thereof plaintiff would show:

1. On January 26, 1982, plaintiff filed a request to file additional amendments to his Complaint, the proposed amendments, and a brief in support thereof.

2. On August 20, 1982, the Court entered an order denying said request to amend on the basis that it was "moot" in view of the Court's decision on that same date sustaining plaintiff's Motion for Partial Summary Judgment.

* * *

If plaintiff can prove the allegations made in his requested amendments of January 26, 1982, then the damage period would be extended until such time as

defendant adopted a valid retirement plan under which the defendant could even attempt to utilize the bona fide executive exception to the ADEA.

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT

OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. CIV-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	

(PROPOSED) ORDER

Now on this ____ day of _____, 1984, comes on for hearing plaintiff's Motion to File Additional Amendments to Complaint, filed on May 3, 1984. After

being fully advised in the premises, the Court finds:

(FIRST AMENDMENT)

1. On August 20, 1982, the Court entered an Order denying plaintiff's previous request to amend his Complaint because it had become moot. . . . Said Order does not prohibit plaintiff from raising issues with respect to other conditions precedent in the Act before defendant is entitled to urge the "bona fide executive" exception. One of those conditions precedent is that the defendant, at the time of plaintiff's forced retirement, have in effect a validly adopted retirement plan which would allow the defendant to assert the "bona fide executive" exception to the ADEA. Plaintiff's requested first amendment

alleges that no such plan has been validly adopted. If that allegation is proved, then defendant would not be able to claim the "bona fide executive" exception until such time as it validly adopted a by-law authorizing the same...

* * *

IN THE UNITED STATES DISTRICT

FOR THE WESTERN DISTRICT

OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. CIV-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	

AMENDMENT TO COMPLAINT

Comes not the plaintiff and, with permission of Court, amends his Complaint

as follows:

1. By adding, as paragraph 12(a): "In addition, the defendant neglected to properly amend its 'Plan for Employees' Pensions, Disability Benefits and Death Benefits' with reference to the 'bona fide executive or high policy making position' exception to the 1979 [sic] amendment to the ADEA. For that reason, it had no legal authority on which to base its decision to retire plaintiff at age 65 and such act constituted a violation of the ADEA in that plaintiff had not attained the age of 70 years."

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT

OF OKLAHOMA

CARL P. CALDWELL, Plaintiff,	)	
vs.	)	No. CIV-81-114T
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	[Filed May 30,1984 Francis C. Bonsiero Clerk, U.S. Dist. Court]

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTIONS TO FILE ADDITIONAL AMENDMENTS TO COMPLAINT

Defendant's Response to Plaintiff's Proposed First Amendment to Complaint

(Alleged Procedural Defects in the Benefit Committee Actions)

Plaintiff's proposed first amendment to complaint consists of two paragraphs to be added to paragraph 12 of the Amended Complaint, both of which para-

graphs concern alleged procedural defects in the process used by defendant's Employee Benefit Committee when amending its pension plan to incorporate 1978 ADEA amendments and fixing plaintiff's pension amount in anticipation of his age 65 retirement.

Plaintiff's requested first amendment does not deal with issues surrounding the conditions precedent to an age 65 mandatory retirement under ADEA, but rather alleges that the defendant's decision making process was defective in that the General Employee Benefit Committee of Southwestern Bell Telephone Company allegedly did not have a lawfully constituted quorum at its meeting held on November 13, 1979, which authorized the plaintiff's retirement pension and simi-

larly that the Committee's action at a meeting held on December 20, 1978, adopting the ADEA amendment to the Plan required approval of the Board of Directors.

* * *

Respectfully submitted,
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COMPANY

EXCERPT FROM CALDWELL'S REPLY BRIEF FILED IN THE 10TH CIRCUIT

C. THE LOWER COURT ERRED IN IN DENYING CALDWELL LEAVE TO AMEND HIS COMPLAINT.

Under 29 U.S.C. §631(c)(1), SWBT had to amend its pension plan so it could retire bona fide executives at age 65 and under 29 C.F.R. §860.120, it had to amend its Plan if it chose to freeze benefits for all employees who continued to work past age 65.

29 C.F.R. §860.120(a)(1) (regulation on freezing of benefits) and 29 C.F.R. §1625.12(b) (regulation on bona fide executives) have almost identical provisions and the latter is quoted below (unnumbered pps. 8 and 9 of attachments to Caldwell's brief in chief):

> "Since this provision is an exception from the non discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakable met. Moreover, as with other exemptions from the Act, this

exemption must be narrowly construed."

Caldwell's request to amend his complaint is addressed to the most fundamental element that SWBT is required to meet, i.e., "were the terms of the SWBT plan properly amended so that the exceptions could be used under the provisions of 29 U.S.C. §623(f)(2) of the ADEA"? Simply put, the issue is whether SWBT's Board of Directors was required to approve the aforementioned changes in the plan. The SWBT pension plan authorizes the "Committee" to make changes in the Plan with the consent of the President and subject to the approval of the Board of Directors. (Addendum to Caldwell's brief in chief, item 1.) The Plan provides that the only exception to the requirement of Board approval is in those instances when "in the opinion of the committee" the changes "are dictated by requirement of federal or state statutes

. . . or authorized or made desirable by such statutes". Caldwell contends that "opinion of the committee" is controlling and that opinion is set forth clearly and unquestionably in the minutes of the December 20, 1978 meeting as follows:

> On recommendation of the Chairman, it is voted that the Chairman be authorized to send the President a letter, copy of which is attached, recommending the changes in the Plan for Employees' Pension, Disability Benefits and Death Benefits, with the request that the President submit the changes to the Board of Directors for consideration. (Addendum to Caldwell's brief in chief, item 7.)

* * *

CALDWELL'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

* * *

As noted in Proposition "C" to Caldwell's Reply Brief, (pp. 10 and 11), under 29 U.S.C. §631(c)(1) Bell had to amend its plan so it could retire a bona fide executive at age 65. The amendment, properly adopted, was just as much a condition precedent to a lawful retirement as was the requisite that Caldwell's pension be nonforfeitable.

Effective January 1, 1979, it became unlawful for Caldwell to be retired at age 65. The only applicable exception was if Bell's pension plan provided for a bona fide executive exception per 29 U.S.C. §631(c)(1). Such an exception must have been incorporated into the Plan. Furthermore, as argued in the aforesaid sections of Caldwell's briefs filed herein, the Plan required the

approval by the Board of Directors for such an amendment. The Board of Directors never gave such approval, even though the benefit committee specifically conditioned the amendment of the Plan on the approval of Bell's Board of Directors. Therefore, by "sidestepping" Bell's Board of Directors, certain executives of Bell were able to obtain an amendment to Bell's pension plan in violation of the terms of the Plan and even in violation of Bell's fiduciary duties owed to the Plan's participants. One never will know whether the Board of Directors would or would not have approved such a bona fide executive exception which would have resulted in their and Caldwell's early retirement. Caldwell and other similarly situated plan participants were deprived of full review of this amendment by Bell's Board of Directors and such was a condition precedent for the implementation of the plan

amendment required to justify Plaintiff's early retirement under 29 U.S.C. §631(c)(1).

Without there being a provision in Bell's Plan for a bona fide executive exception to the Act's protection to age 70, 29 U.S.C. §631(c) has no applicability to Bell's retirement of Caldwell because, the pension plan itself must provide for the retirement of a bona fide executive at age 65 along with his right to a nonforfeitable annual benefit. Bell itself recognized this requirement, but was in such a rush to implement it prior to the January 1, 1979 effective date of the ADEA amendment, that Bell neglected (refused) to obtain its Board of Directors' approval as required under the Plan and as required by the Plan's Benefit Committee.

In summation and irrespective of Caldwell's status as a bona fide executive or the status of his pension plan

benefits as nonforfeitable, unless Bell properly enacted an amendment to its pension plan prior to the retirement of Caldwell, Bell is unable to rely upon the bona fide executive exception for his forced early retirement. By prohibiting Caldwell from amending his complaint to include such pertinent allegations and thereby proving them at a trial below, the lower court abused its discretion. The present Opinion in finding "no such abuse of discretion by the district court", renders the decision in conflict with the rule of law set forth by the United States Supreme Court in Foman vs. Davis, supra. and by this Circuit in Triplett v. LeFlore County, Okl., supra., and Childers v. Independent School District No. 1 of Bryan County, supra.

* * *